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No. 92-1645

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CITY OF LOS ANGELES,
Petitioner,
vs.
JOHNNY LEE JACKSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this matter, the Court of Appeals' decision is consistent with the framework developed by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) and *City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), and creates no conflicts among the lower courts.

2. The holding that a police employee may not be constitutionally discharged for exercising his Fourth Amendment rights is consistent with this Court's decisions and creates no conflict among the lower courts.

3. The Court of Appeals' decision is consistent with the framework developed by this Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 S.Ct. 1384, 103 L.Ed.2d 685 (1989) and *Railway Labor Executives Association v. Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and creates no conflict among the lower courts.

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No. 92-1645

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE CITY OF LOS ANGELES,
Petitioner,
v.
JOHNNY LEE JACKSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Johnny Lee Jackson was a regularly-appointed member of the Los Angeles Police Department, who could be discharged only "for cause" under City Charter Section 202 when, on February 21, 1986, at about 1:30 a.m., Internal Affairs Division ("IAD") officials arrived unannounced at Jackson's home when Jackson was asleep, and demanded that he submit to urine testing immediately because he was suspected of ingesting cocaine.

IAD officials who were surveilling the target of the investigation, Officer John Leach, had seen Jackson in the company of Leach on two occasions on February 13 and 20, 1986, after the two left work at Southwest Area Station together. On the first occasion, while Jackson waited in the car, Leach went into two different large apartment houses suspected to be "narcotics locations". Jackson was never a target of the investigation, but since he was in the company of Leach (who was suspected of using cocaine), IAD officials wanted a sample from Jackson to determine whether he was also possibly using cocaine.

After some discussion at Jackson's home, the IAD officials took Jackson against his will to Parker Center, some 25 miles away, for the sole purpose of obtaining the urine sample. There, Jackson refused to comply with the order, relying on a Department rule that "substantial evidence" of ingestion must exist before an employee can be ordered to supply a testing sample in these circumstances.

Jackson was charged only with insubordination for refusing the order and was discharged by Chief Gates. Jackson was never accused of being involved in drug use or possession in connection with these circumstances.

Jackson utilized the grievance procedure and after a hearing on the merits, an independent neutral ordered Jackson reinstated with full back-pay and benefits (about 1-1/2 years after the discharge) because investigators did not have substantial evidence of drug use or involvement.

Jackson sought further relief in the District Court in a lawsuit under 42 USC Section 1983, which was tried to a jury. A verdict was returned in favor of Jackson against Chief Gates and the City of Los Angeles.

The jury was instructed that an officer could not constitutionally be discharged for refusing to obey an unconstitutional order.

In the Court of Appeals, Jackson's judgment was affirmed on the basis that the Fourth Amendment may be violated where the discharge is based upon an order which is contrary to the protections of the Fourth Amendment, and on the basis that Gates, in acting to discharge Jackson, and as the final policymaker under local law, subjected the City to liability under Section 1983.

Petitioner's request for rehearing and rehearing *en banc* were denied.

This petition follows.

REASONS FOR DENYING THE WRIT

I.

IN THIS MATTER, THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FRAMEWORK DEVELOPED BY THIS COURT IN *PEMBAUR V. CITY OF CINCINNATI*, AND *CITY OF ST. LOUIS V. PRAPROTNICK*, AND CREATES NO CONFLICTS AMONG THE LOWER COURTS.

A. PETITIONER DOES NOT CLAIM THAT THE COURT OF APPEALS' DECISION CREATES A CONFLICT AMONG THE CIRCUITS.

Petitioner's brief nowhere alleges that this Court of Appeals decision creates a conflict among the circuit courts with respect to the holding that Chief Gates acted as a final policymaker in his decision to discharge Officer Jackson from police employment. Hence, there is no reason for this Court to grant the petition on this point. Moreover, as appears below, the decision correctly follows this Court's holdings on the subject.

B. THE COURT OF APPEALS PROPERLY DECIDED THE CASE UNDER THE *PEMBAUR* AND *PROPRATNICK* DECISIONS.

1. The holding in *Praprotnick* -- whether under state law, Chief Gates was the official with final policymaking authority -- was correctly applied to the facts in this case.

In *City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 108 (1988), this Court held that the question of whether an official was clothed with final policymaking authority is to be determined by reference to the applicable provisions of state law. There is no dispute that the applicable state law -- the charter of the City of Los Angeles -- vests Chief Gates with final policymaking authority in matters of the discipline of police officers generally, and in particular, in regard to decisions to discharge them from employment. Accordingly, the Court of Appeals decision follows *Praprotnick* and there is no reason for review of the decision on that point.

2. The Doctrine of *Respondeat Superior* plays no role in the decision of this case.

Contrary to petitioner's assertions, the Court of Appeals opinion constitutes neither a reintroduction of *respondeat superior*, nor an incorrect application of the plurality holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). After all, it is not disputed that Chief Gates is the City official with final policymaking authority over the discipline of police officers. As such, his decisions *are those of the City*. Likewise, a suit against a policymaker in his official capacity is nothing more than an action against the City itself. In these circumstances, the doctrine of *respondeat superior* is not implicated. *Pembaur*, 475 U.S. at 481.

There was a "policy" involved in this case. The "obey now--grieve later" rule requires Los Angeles officers to obey orders of their superiors (in our case, to submit to suspicion-based, compelled urinalysis) or face the lash of administrative discipline. The only recognized exceptions to the rule are where the order requires the recipient to commit an unlawful act, perform an immoral act, or

unreasonably endanger someone's safety. Chief Gates' position throughout this action has been consistent: since the order to Jackson involved none of the three exceptions, his *duty was to obey* and seek relief through the grievance procedure -- *after* surrendering his Fourth Amendment rights.

As the Court of Appeals noted, no one claims the City has a policy of requiring employees to submit to unconstitutional searches. Nevertheless, the insubordination rule described above requires unquestioning obedience to "lawful" orders. Even if it develops that the order is unconstitutional, the employee who chooses to disobey, does so at his peril.

C. THE COURT OF APPEALS DECISION CONSTITUTES A FACT-SPECIFIC DETERMINATION UNDER *PRAPROTNICK* AND THEREFORE DOES NOT WARRANT REVIEW.

Petitioner attempts to distinguish this case, where the insubordination policy and the Memorandum of Understanding provisions on suspicion-based drug testing were in place, from a hypothetical situation where a final policymaker acts in a circumstance when there is no policy one way or the other. There is no distinction. Where a final policymaker inflicts a constitutional injury, it makes no difference whether his act is a mistaken attempt to apply existing rules, or an isolated act carried out where no rules govern. The constitutional harm is inflicted by the municipality, since the act is that of the entity itself.

For support of this perceived distinction, petitioner quotes from *Pembaur*, 475 U.S. at 482-483 (see petitioner's brief at pp. 21-23). The passage selected by

petitioner omits the all-important sentence which immediately follows:

> The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Since Chief Gates is the official responsible for establishing final City policy respecting the discipline of police officers, the Court of Appeals decision is in accord with the *Pembaur* plurality opinion.

At 475 U.S. at 483, this Court said:

> We hold that municipal liability attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final government policy respecting such activity before the municipality may be held liable. fn. 12.

In applying *Pembaur* and *Praprotnick*, the Court of Appeals determined under the isolated and specific facts of this case, that Gates acted with final policymaking authority vested in him by local law, in deciding to discharge Jackson.

High ranking government officials normally and routinely perform discretionary acts within circumstances where there are policies, regulations and other government restrictions in place. Every such act can be linked to some identifiable source of policy. Petitioner's assertion that a final policymaker's act can create municipal liability only

when he acts in an area where no policy is present -- thus by his act making policy -- world be a rare, if not impossible occurrence. Petitioner's view, if adopted, would create an exception in every case that would swallow up the rule that a final policymaker's unconstitutional act within his area of final policymaking authority creates municipal liability. No case supports this view.

Petitioner's discussion of footnote 12 is also flawed, by omission of the clarification that if the hypothetical sheriff did have final policymaking authority over county sheriff employment policy, his discretionary decisions respecting hiring and firing *would represent county policy and would give rise to entity liability*. Again, the Court of Appeals' disposition of this matter correctly follows *Pembaur*.

Accordingly, on these points, the decision does not merit review.

II.

THE HOLDING THAT A POLICE EMPLOYEE MAY NOT BE CONSTITUTIONALLY DISCHARGED FOR EXERCISING HIS FOURTH AMENDMENT RIGHTS IS CONSISTENT WITH THIS COURT'S DECISIONS AND CREATES NO CONFLICT AMONG THE LOWER COURTS.

A. PETITIONER HAS FAILED TO CITE ANY AUTHORITY FOR THE PROPOSITION THAT A PUBLIC EMPLOYEE MAY BE DISCHARGED FOR EXERCISING A CONSTITUTIONAL RIGHT.

The Fourth Amendment protects municipal employees from unreasonable employer searches of the person in the disciplinary context. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 S.Ct. 1384, 103 L.Ed. 2d 685 (1989); *Railway Labor Executives Assoc. v. Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed. 2d 639 (1989); *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485 (9th Cir. 1986). Thus, a suspicion-based search and seizure of body fluids conducted pursuant to administrative order based upon pain and penalty of insubordination for refusal to obey implicates the Fourth Amendment and is only lawful if it is reasonable. Discipline for insubordination must be predicated only upon the refusal to obey a lawful order; that is, one that is constitutionally reasonable. *Los Angeles Police Protective League v. Gates* (hereafter, *"LAPPL v. Gates"*) 907 F.2d 879, 886 (9th Cir. 1990). In the event of a "refusal" no search occurs. The order alone, which

is not obeyed, is not a constitutional wrong. The order alone constitutes only a threat that discipline will be forthcoming. Improvident orders can be withdrawn, and no one would say that liability would flow from an unreasonable order which is promptly withdrawn, or where the refusal to obey is ignored and no adverse action follows. No harm occurs until discipline is initiated. Then, the Fourth Amendment is violated and any resulting discipline is unconstitutional. *LAPPL v. Gates*, 907 F.2d at 895; *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987). So, in our facts, the constitutional harm was inflicted not by the investigators who gave the order, but rather by Chief Gates who discharged Jackson for his "insubordination". Nevertheless, the constitutional injury to Jackson stems from his Fourth Amendment rights.

B. PETITIONER FAILS TO DISTINGUISH THIS COURT'S DECISIONS HOLDING THAT A PUBLIC EMPLOYEE MAY NOT BE DISCHARGED FOR EXERCISING A CONSTITUTIONAL RIGHT.

This Court has held that public employees' First Amendment rights may be violated by punishing the lawful exercise thereof, as well as by restraining lawful speech in the first place. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968), *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983); *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983). Further, public employees' Fifth Amendment rights are violated by disciplining them for refusal to waive their rights against self-incrimination as a condition of employment. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); *Gardner v. Broderick*, 392 U.S. 273, 276-79, 88 S.Ct. 1913, 20 L.Ed. 2d 1082 (1968). By parity of reasoning, Jackson's punishment

violated the Fourth Amendment because he was made to suffer job loss as a consequence of the lawful exercise of the right to refuse an unconstitutional search. Apart from this reasoning, whether the punishment for Jackson's refusal to obey an unconstitutional order is deemed to violate the Fourth Amendment or the Fourteenth Amendment due process clause, will not change the consequences of that act, nor the result approved by the Court of Appeals.

It is true that respondent initially claimed violations of his Fourth and Fourteenth Amendment rights. The latter claim was based on the theory that Gates' action was arbitrary and irrational. The District Court and the Court of Appeals disagreed. However, simply because Gates' action may not have been irrational does not mean it did not violate due process if the order upon which it was predicated was unconstitutional. All agree that a police officer may not be punished for refusing to obey an unconstitutional order. While acknowledging this, petitioner would have this Court deny an aggrieved officer recovery for consequential damages unless the governmental conduct was irrational. The due process clause is not so impotent. Petitioner fails to see a distinction in due process claims which allege solely that the government conduct was arbitrary and irrational, from those as here, where the government action implicates an independent constitutional right -- the Fourth Amendment.

If petitioner is correct that the government action became a due process violation once discipline was undertaken, then it must also accept that the due process clause provides a remedy once it is established that the discipline is based upon the refusal to obey an order which, standing alone, is unconstitutional. To hold otherwise would deny constitutional protection in all cases except only the most

egregious, irrational, arbitrary and wholly unreasonable acts of final policymakers.

Finally, Petitioner fails to acknowledge or distinguish this Court's decisions holding that public employees may not constitutionally be discharged for exercising a constitutional right.

III.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FRAMEWORK DEVELOPED BY THIS COURT IN NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB, AND *RAILWAY LABOR EXECUTIVES ASSOC. V. SKINNER*, AND CREATES NO CONFLICT AMONG THE LOWER COURTS.

A. THERE IS NO DISPUTE OR CONFLICT REGARDING THE APPLICABILITY OF THE BALANCING TEST IN *VON RAAB* TO THIS CASE.

Carefully drawn government testing regulations approved in *Von Raab* and *Railway Labor Executives Assoc.* eliminate the need for individualized suspicion because they do not involve the exercise of supervisory discretion in selecting who will be tested, and when and how it will occur. Consequently, the potential for arbitrariness and abuse is non-existent.

On the other hand, here the Court of Appeals determined that where, on the basis of investigatory activity, a police officer is taken form his home in the middle of the night

against his will, and ordered to provide a sample of his urine for testing because he is individually suspected, a "reasonable suspicion" standard should be respected. In applying the balancing test of *Von Raab*, to the specific facts of this case, the Court of Appeal determined that the order was not reasonable.

Random and event-triggered testing provisions frequently do coexist with suspicion-based provisions within the same government regulations. See, for example, *National Federation of Federal Employees v. Cheney*, 884 F.2d 603, 605-06 (D.C. Cir. 1989); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 493 U.S. 963, 110 S.Ct. 404, 107 L.Ed. 2d 370 (1989); and *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133, 135 (3rd Cir. 1988).

Other cases approve of the "reasonable suspicion" standard in suspicion-based testing. See, for example, *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3rd Cir. 1988); and *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74 (3rd Cir. 1988).

However, there are no cases which suggest or adopt petitioner's view that *Von Raab* and *Railway Labor* abolished the need in every case for reasonable suspicion to support a suspicion-based order. On these grounds as well then, no review is warranted.

B. THE COURT OF APPEALS DETERMINED THAT JACKSON HAD A LEGITIMATE EXPECTATION OF PRIVACY AGAINST AN INDIVIDUALIZED SEARCH BASED WHOLLY ON A SUPERVISOR'S UNFETTERED DISCRETION.

The decision only holds that, unlike *Railway Labor* and *Von Raab*, the facts of this case concern a wholly unbridled exercise of supervisory discretion in singling out Jackson for testing. Since, under the facts, the search order was not reasonable, it violated the Fourth Amendment. Again, there is nothing in the opinion that warrants review.

CONCLUSION

For all of the above reasons, it is respectfully suggested that the petition should not be granted.

Dated: May 25, 1993

Respectfully submitted,

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